82-1563



No.

IN THE

# Supreme Court of the United States

October Term, 1982

EDWARD G. HALLEY,

*Petitioner,*

-against-

CONSOLIDATED RAIL CORPORATION,

*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

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(13742)

QUESTION PRESENTED FOR REVIEW

Is the "Liepelt doctrine"*, (jury awards for future lost earnings must be based on plaintiff's net income), which is presently extended to all federal law claims for future lost wages, properly applied as well to claims for past lost wages in actions arising under the Federal Employers' Liability Act, 45 U.S.C. § 51 et seq.?

* Norfolk & Western Railway Co. v. Liepelt, 444 U.S. 490, 100 S. Ct., 755, 62 L.Ed.2d 689 (1980).

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

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EDWARD G. HALLEY,

Petitioner

-against-

CONSOLIDATED RAIL CORPORATION,

Respondent.

---

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Justices of the Supreme Court of the United States:

Petitioner Edward G. Halley respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit denying his appeal of the remittitur ordered by the United States District Court for the Southern District of New York.

## OPINIONS BELOW

The opinions of the Court of Appeals are not reported and are set forth in Appendix A, infra at A-1, et seq. The opinion of the District Court is not reported and is set forth in Appendix D, infra at A-__ et seq.

## PARTIES

The plaintiff in the courts below was Edward G. Halley, a freight train conductor.

Defendant was Consolidated Rail Corporation (Conrail), his employer.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28 U.S.C. §1254 which states in pertinent part- "Cases in the courts of appeals may be reviewed by the Supreme Court*** (1) By writ of certiorari granted upon the petition of any party to any civil *** case, before or after rendition of judgment or decree".

STATEMENT OF THE CASE

This was an action brought under the Federal Employers' Liability Act (FELA), 45 U.S.C. 51, et seq., as the result of a train wreck on January 5, 1979, following which plaintiff was out of work until April 19, 1979. Recovery was sought for past and future loss of income and past and future pain and suffering. Liability was conceded,

and the case was tried to the issue of damages only.

The jury returned a unanimous verdict in plaintiff's favor in the sum of $10,000 for past lost wages; $100,000 for future lost wages; $50,000 for past pain and suffering; and $25,000 for permanent pain and suffering.

Following defendant's motion to set aside the verdict and for a new trial, the trial judge ordered that the jury's awards for past and future loss of earnings be reduced by 25% to account for taxes that plaintiff would have paid and based this reduction on this Court's decision in Liepelt, supra. The trial judge further ordered that the award for pain and suffering subsequent to April 19, 1979 be reduced from $25,000 to $500 and that plain-

tiff either accept this remittitur or submit to a new trial.

Plaintiff appealed the trial judge's reduction of the verdict, and defendant cross-appealed on the grounds that the verdict, even as reduced by the Order, was excessive.

The United States Court of Appeals for the Second Circuit ruled the appeal premature and, without deciding its merits, mandated that plaintiff pursue the case to final judgment and submit to a second trial before appealing the remittitur ordered after the first trial.

A second trial was held on April 14, 1982; final judgment was entered on April 21, 1982; and plaintiff appealed again. The Second Circuit affirmed the District Court's reduction by 25% of the jury's awards for past and future lost earnings to arrive at an approximate equivalent of net income. Plaintiff's

petition for a rehearing en banc was denied on December 21, 1982.

## REASONS FOR GRANTING THE WRIT

### I.

### LIEPELT AND ITS PROGENY HAVE ESTABLISHED THAT AWARDS FOR FUTURE LOST EARNINGS MUST BE BASED ON PLAINTIFF'S NET INCOME BUT HAVE NEVER APPLIED THIS RULE TO AWARDS FOR PAST LOST EARNINGS

In the Liepelt case of 1980, this Court ruled it error to exclude evidence of plaintiff's tax profile and circumstances in an FELA wrongful death action but did not entertain the question of past lost earnings. Since that decision, Federal Circuit Courts of Appeals nationwide have been faced with the problem of interpreting Liepelt and applying its directives to computation of damages and jury instruction.

By now, a sizable body of case law has developed and clearly establishes that the precepts of Liepelt must be

applied to all federal law claims for future lost wages. This Court has placed its imprimatur on these holdings with its decision in Gulf Offshore v. Mobil Oil, 453 U.S. 473 (1981), which definitively rules that awards for future lost earnings must be based on plaintiff's net income.

A large, unresolved question remains, however, with regard to the determination of awards for past lost earnings, which comprise a portion of almost every FELA action, as they do in the instant case, yet have been addressed neither by this Court in Liepelt or Gulf Offshore nor by the Circuits in the cases citing and interpreting Liepelt.

In the instant case, the District Court's enlargement of the scope of the principles set forth in Liepelt to include and authorize blanket reduction of the jury's awards for both future and

past lost earnings raises an important consideration germane to the determination of similar damage awards to railroaders in every district and circuit in the country.

A rule of law enunciated and clarified for the sole purpose of determining damage awards for future lost earnings based on net income ought not to be perforce extended automatically to awards for past lost earnings as well. It is abundantly clear that the two losses and their concomitant circumstances and ramifications are not synonymous and should be distinguished.

## II.

## APPLICATION OF THE TENETS OF LIEPELT TO AWARDS FOR PAST LOST EARNINGS DELETERIOUSLY AFFECTS RAILROADERS THROUGHOUT THE NATION AND AUTHORIZES UNJUST WINDFALLS FOR TORTFEASOR RAILROAD COMPANIES

Extension of the Liepelt precepts to awards for past lost earnings has already had a pernicious effect on the railroad industry and unless checked by judicial clarification will continue to wreak economic havoc on railroaders throughout the nation.

The majority of railroad workers are not paid during the time they are out of work because of injury, and almost every FELA claim includes a portion for past lost earnings. In fact, it is common practice for company claims departments to use a multiple of total past lost earnings as a basis for evaluating a claim, whether for serious or relatively minor injury.

Due to what has now been hailed throughout the industry as "the net income rule", railroad claim departments automatically reduce total past lost earnings to net income in all preliminary settlement negotiations with injured workers, making settlement of claims less likely and obliging the injured employee to seek redress in the courts and prolong still further the restoration of past lost wages.

Plaintiff herein was out of work for only four months after the accident. If the District Court's reduction to net income of the award for past lost earnings is allowed to stand, it will have even more chilling effects upon those injured railroaders compelled to remain out of work for much longer periods of time.

Extended lack of income consumes

the savings and undermines the general financial status of railroad workers and their families. Mortgage, car and household payments falter and stop; within a short period of time many are compelled to borrow from family and friends; from banks and finance companies; and not infrequently forced to seek welfare or other State aide. Interest, late charges and fines, which would not have been assessed under normal circumstances, accrue as further accident-related expense. Clearly, an award of "net income" does not make a plaintiff whole, and net income received as the result of a lawsuit two, three or more years after the actual wage loss does not restore him to his pre-accident economic position.

Conversely, the railroad receives a windfall from this very situation. Under the Railroad Retirement Act, 45 U.S.C. §231 et seq., provision is made for social security and pension, and payments by the company are allocated according to the number of months in which an employee works and receives salary. When an injured employee does not work and is not paid, he receives no credit towards his social security or pension funds. The railroad accordingly makes no payments into these funds nor does it pay withholding taxes. Rather, the railroad retains these monies as its own, to invest, reinvest, earn interest. Then, when it is necessary to pay the worker damages for his past lost earnings, the railroad claims the "net income rule" and deducts a percentage of his wages with-

out ever having had to make the concomitant social security, pension and withholding payments.

Unless clarification of the "Liepelt doctrine" with respect to past lost earnings is forthcoming, railroad workers will suffer still other insidious consequences that compound the purely monetary inequities already mentioned.

Retirement schedules are based on specified spans of "creditable service". An injury with prolonged recuperative requirements tolls his "creditable service" time and can add years to his normal retirement schedule.

Moreover, an employee's total tax picture includes the pension payments made by the company, and if in fact he is entitled only to net wage

loss as an award for past lost earnings, he should also be entitled to credit for the tax deduction that was never actually made but withheld by the railroad. If the courts do in fact hold that an injured railroad worker who recovers for past lost earnings should pay a tax on these monies, Congressional legislation or an IRS rule change will be needed to channel these funds away from the railroad and toward the benefit of the taxpayer and the government.

The rule of the instant case is a perversion of the "Liepelt doctrine" which permits the tort-feasor to profit from his tortious conduct and promotes a glaring inequity, contrary to the basic principles of tort law. The consequences that will flow from it with expanding

effect, if it is allowed to stand, surely merit consideration..

There are compelling reasons to enunciate a rule with respect to past lost earnings that removes them from the aegis of Liepelt and effects an equitable and just resolution.

## CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-first day of December one thousand nine hundred and eighty-two..

----------x

EDWARD G. HALLEY,

Plaintiff-Appellant-Cross Appellee,

-v-

CONSOLIDATED RAIL CORPORATION,

Defendant-Appellee-Cross Appellant.

----------x

No. 82-7332

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiff-appellant-cross appellee, Edward G. Halley,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro, Clerk

by:Francis X. Gindhart,
Chief Deputy Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 15th day of October, one thousand nine hundred and eighty-two.

Present:

HONORABLE IRVING R. KAUFMAN,

HONORABLE THOMAS J. MESKILL,

HONORABLE THOMAS E. FAIRCHILD,

U.S. Court of Appeals, Seventh Circuit, sitting by designation.

----------x

EDWARD G. HALLEY,

Plaintiff-Appellant-Cross-Appellee,

-v-

CONSOLIDATED RAIL CORPORATION,

Defendant-Appellee-Cross-Appellant.

----------x

No. 82-7332

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

1. The district court properly reduced the damage award for lost earnings in the first trial, by taking into account Halley's tax bracket. Norfolk & Western Railway Co. v. Liepelt, 444 U.S. 490 (1980). While the parties dispute the substance of their agreement, Judge Knapp's order makes it clear there was a stipulation that Halley was in a 25% tax bracket. It was not improper for the judge to reduce the jury award for lost earnings, rather than requiring the jury to consider testimony concerning Halley's tax bracket and to make the appropriate deductions. Cf. Chiarello v. Domenico Bus Service, 542 F.2d 883, 886-87 (2d Cir. 1976) (court indicates approval for district court's reduction of damage award to account for present value of future injuries).

2. Judge Knapp did not abuse his discretion in reducing the jury award for future pain and suffering from $25,000 to $500. While jury verdicts in Federal Employers' Liability Act cases "are particularly resistant to being overturned", Akermanis v. Sea-Land Service, Inc., Nos. 81-7883, 81-7873, slip op. at 4813 (2d Cir. Sept. 14, 1982), the district court does have discretion to order a remittitur where an award is clearly unsupported by the evidence. See Reinerstein v. George W. Rogers Construction Corp., 519 F.2d 531-32 (2d Cir. 1975). The court corectly found that there was no support in the record for the $25,000 award, and accordingly, the remittitur was proper.

3. The $100,000 award for lost earnings, reduced to $75,00 by the district court, was within a reasonable range, and was not without support in the record. Accordingly, Judge Knapp properly declined to order a remittitur for this award.

4. The judgment is affirmed.

IRVING R. KAUFMAN,

THOMAS J. MESKILL,

THOMAS E. FAIRCHILD,
Circuit Judges.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twelfth day of May, one thousand nine hundred and eighty-one.

Present:

HONORABLE IRVING R. KAUFMAN,

HONORABLE JAMES L. OAKES,
Circuit Judges,

HONORABLE HENRY F. WERKER,
District Judge,
sitting by designation.

----------x

EDWARD G. HALLEY,

Plaintiff-Appellant-
Cross-Appellee.

v.

CONSOLIDATED RAIL CORPORATION,
Defendant-Appellee-
Cross-Appellant.

----------x

No. 81-7024, 82

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the appeals are dismissed.

1. The district court's order granting a new trial unless plaintiff accepted the remittitur was not final, and no judgment has been entered. Accordingly, plaintiff's appeal is dismissed. Eaton v. National Steel Products Co., 624 F.2d 863,864 (9th Cir. 1980) (per curiam). See also Howell v. Marmpegaso Compania Naviera, S.A., 566 F.2d 992, 993 (5th Cir. 1978).

2. Judgments entered on jury awards reduced by the trial court and accepted by the plaintiff are not appealable, since plaintiff has agreed to the reduction. Donovan v. Penn Shipping Co., 429 U.S. 648 (1977) (per curiam); Reinertsen v. George W. Rogers Construction Corp., 519 F.2d 531, 533 (2d Cir. 1975); S. Burch & Sons v. Martin, 244 F.2d 556, 562 (9th Cir.), cert. denied, 355 U.S. 837 (1957).

3. Similarly, orders granting a new trial are not appealable immediately, whether accompanied by remittitur or not. Evans v. Calmar Steamship Co., 534 F.2d 519, 522 (2d Cir. 1967). See also Compagnie Nationale Air France v. Port of New York Authority, 427 F.2d 951 (2d Cir. 1970). Rather, plaintiff must pursue the new trial to judgment, and then appeal the district court's decision to set aside the first verdict and grant a new trial. See Reinertsen v. George W. Rogers Construction Corp., supra, 519 F.2d at 533-34.

4. The district court's order conditionally setting aside the jury verdict is not "separable from the merits". Handwerger v. Ginsberg, 519 F.2d 1339 (2d Cir. 1975). Accordingly, it is not reviewable under the doctrine of Cohen v. Beneficial Industrial Loan Corp.,

337 U.S. 541 (1949). See generally UAW v. National Caucus of Labor Committees, 525 F.2d 323 (2d Cir. 1975).

5. No final disposition of the award for future lost income has been made. The district court's order with respect to that award is not final and not appealable. Accordingly, Conrail's cross-appeal is dismissed. See Catlin v. United States, 324 U.S. 229 (1945).

IRVING R. KAUFMAN,

JAMES L. OAKES,
Circuit Judges.

HENRY R. WERKER,
District Judge.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

EDWARD G. HALLEY, :

Plaintiff, :

-against- :

CONSOLIDATED RAIL CORPORATION, :

Defendant. :

----------X

MEMORANDUM AND ORDER

79 Civ. 2137

KNAPP, D.J.

Four questions are presented by defendant's post trial motion:

1. Whether or not the award of $10,000 for loss of earnings for the period from January 5 to April 19, 1979, and of $100,000 for diminution of earnings from April 19, 1979 should be reduced by the stipulated 25% to make allowance for the non-taxability of said awards. The parties agreed at the charging conference that 25% fairly

represents the taxes plaintiff would have had to pay had he earned the sums awarded him by the jury. We find for the defendant on this question for the reasons discussed at the charging conference. See Norfolk & Western R. Co. v. Liepelt (1980) 444 U.S. 490.

2. Whether or not the award for lost and/or diminution of future earnings should be set aside or reduced for plaintiff's failure to mitigate damages by seeking appropriate psychiatric assistance. We find for the plaintiff on this question.

"(A)n elemental principle of damages is that the defendant must bear the burden of proving mitigation." G. & R. Corporation v. American Security & Trust Company (D.C. Cir. 1975) 523 F 2d 1164, 1176. "While Plaintiff was under an obligation to mitigate damages, it was Defendant's burden to prove that

Plaintiff failed in this obligation." Diversified Environments, Inc. v. Olivetti Corporation of America (M.D. Pa. 1978) 461 F. Supp. 286, 292. See also Caiazzo v. Volkswagenwerk, A.G. (E.D.N.Y. 1979) 468 F. Supp. 593, 598-99; United States v. Russell Electric Co. (S.D.N.Y. 1965) 250 F. Supp. 2, 24; T.C. Bateson Construction Company v. United States (Ct. Cl. 1963) 319 F.2d 135, 160 ("(T)he burden of proof with respect to a plaintiff's asserted failure to mitigate damages rests upon the defendant who asserts it.") In the instant case, defendant failed to offer a scintilla of evidence on this issue, or to contradict Dr. Eshkenazi's opinion that any psychiatric treatment of plaintiff would probably have been futile. We also feel that the amount of damages awarded with regard to future earnings constitutes a jury question not subject to our review.

3. Whether or not the award for pain and suffering endured by plaintiff between January 5 and April 19, 1979 should be reduced. We find for the plaintiff on this question. Although the award was generous in the extreme, we cannot say that it shocks the conscience of the court. As the Court of Appeals for this Circuit has recently observed in a somewhat different context, "(i)t is well established that the role of the jury is significantly greater in Jones Act and FELA cases than in common law negligence actions." Johannessen v. Gulf Trading & Transportation Co. (2d Cir. 1980) _____ F.2d _____ (Slip opinion, September Term, 1980, at 125, 130).

4. Whether or not the award for pain and suffering endured by plaintiff after April 19, 1979 should be set aside

or reduced. We find substantially for the defendant on this issue. At trial, we charged, over the defendant's objection, that the jury could consider "Humiliation" or other forms of emotional distress. With the exception of the two rides on the fast trains, there is not a scintilla of evidence that plaintiff suffered, is suffering, or is likely in the future to suffer any discomfort so long as he avoids fast freight trains. We believe that the monetary damages for diminution of earnings has adequately compensated him for this deprivation, and that the sum of $500 would be ample compensation for any emotional distress suffered during and/or after the two rides on the fast freight trains. We will accordingly direct a new trial as to the entire case unless the plaintiff on or before January 16, 1981 submits a judgment on five (5)

days' notice which reflect such remittitur and is otherwise in accordance with this Memorandum and Order.

Let the plaintiff submit an appropriate order on five (5) days' notice.

SO ORDERED.

Dated: New York, New York
December 24, 1980.

WHITMAN KNAPP, U.S.D.J.

No. 82-1563

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

EDWARD G. HALLEY,

*Petitioner,*

*—against—*

CONSOLIDATED RAIL CORPORATION,

*Respondent.*

## BRIEF ON BEHALF OF RESPONDENT CONSOLIDATED RAIL CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

EDWARD G. HALLEY,

*Petitioner,*

*—against—*

CONSOLIDATED RAIL CORPORATION,

*Respondent.*

# BRIEF ON BEHALF OF RESPONDENT CONSOLIDATED RAIL CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

## I.

## The Facts

Plaintiff recalls no physical contact with anything during and after the derailment at 25 miles an hour (A98) of the train he was riding in, and felt no pain until about four hours later, when his chest bothered him (A58-9). He applied the emergency brakes when he felt the derailment occurring, and as the train came to a stop, he opened the door of the second engine, climbed down the side ladder, and stepped to the ground without losing his balance (A44-5, 96-8). He then walked to a tower 30 cars away (A46). No one else on the train was injured (A104).

The three doctors who treated his chest, Dr. Friedman, Sr. and Jr., and Dr. Genninger (A61, 65, 68), never testified at either trial. Plaintiff was never confined to a hospital for his injury and had no fractures or dislocations (A436). After his return to work on April 19, 1979 following 3½ months absence, plaintiff took no medication (A115), experienced no physical pain (A85) and received no further treatment for his chest (A114-5).

When he was examined on April 16, 1979 by Dr. Quinn for fitness to return to work, plaintiff was found qualified without restriction, and stated above his signature that he had no pain or pressure in his chest, that he had no excessive worry or depression, and that he knew of no physical or mental condition which might restrict his ability to work (A441). His psychologist, Dr. Rodgers, who counseled him until June of 1979 for depression and anxiety, in his report of April 12, 1979 placed no restrictions on his resumption of work (A442), and in his report of June 13, 1979 placed no restrictions, mentioned no residual fears or anxieties, and said that plaintiff's prognosis was fine (A215, 239, 452).

Plaintiff's principal claim was not his minor chest injury but an alleged phobia for riding fast freight trains, as opposed to local and yard freight trains, based on one attempt to ride a fast freight train in May of 1979 (A77-8) and a second attempt in December of 1979 (A81). Plaintiff has therefore confined his railroad work to local and yard freight, some of which go up to 40 miles an hour (A122), and has allegedly lost earnings because of not taking jobs on fast freights (A88-9). Dr. Rodgers at the original trial was not sure if plaintiff's phobia as to fast freights was permanent (A240) or if plaintiff still had it (212-3).

Dr. Eshkenazi, who was not a diplomate in his field and saw plaintiff once before the original trial at the request of plaintiff's attorney for the purpose of testifying (A246, 263-4), said plaintiff's problem was limited to a fear of fast trains (A256), said he didn't know if plaintiff's condition was permanent (A262) and suggested that plaintiff should have appropriate treatment so he could work fast freight trains (A284-5), which plaintiff has not done.

Plaintiff's estimate of lost earnings was based on hearsay from talking to others of higher seniority (A89) on the assumption, no longer true (A290, 292-3, 313, 316), that he now would

have sufficient seniority to hold down a regular fast freight conductor's job. His being on the extra list now allows him to make more money than if he held a regular job as he did before his accident (A303). He now gets overtime pay at time and a half on his local and yard freight jobs (A343-4). For the first six months after returning to work he earned $4,000 more than for the last six months before his accident (A129, Ex. D, 443). Based on current wage rates, shown in Exhibit 5 (A432-3), plaintiff can make about the same pay on his present work as he did before as a regular conductor in fast freight and with less distance to travel to and from work. The current pay for the job he had at the time of accident was $141.26 for brakemen and $151.00 for conductors (A164-6). By working four hours overtime on local and yard freight jobs, plaintiff can earn $141.08 as brakeman and $148.44 as conductor (Ex. 5, A453–see top and middle right-hand column of Ex. 5).

At the original trial plaintiff's attorney objected to the use of the net-income rule of the *Liepelt* case but agreed that if it applied it would be appropriate to use 25% of plaintiff's gross income as the amount of his income taxes (A354-5, 404, 423, 444, 449, 466).

The jury verdicts at the two trials differed radically: $185,000 at the first trial and $29,420 at the second trial (A421, 474A).

## II.

### Reasons for Denying Certiorari

*Norfolk & Western Ry. Co.* v. *Liepelt*, 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed.2d 689 (1980), reh. den. 445 U.S. 972, 100 S.Ct. 1667, 64 L.Ed.2d 250 (1980)–commonly referred to as the *Liepelt* decision–decided the very issue which petitioner claims (Petition, pp 6, 7, 8, 9, 13) that it did not decide, i.e., the applicability of the net-income rule to past lost earnings.

In *Liepelt* this Court held (p. 491) that "it was error to exclude evidence of the income taxes payable on the decedent's *past* [emphasis supplied] and estimated future earnings." Nowhere in its opinion did this Court make any distinction between past and future loss of net earnings.

Petitioner does not suggest that there is on this issue any difference in principle between death actions (*Liepelt*) and personal injury actions (case at bar). The Internal Revenue Code, 26 U.S.C. §104(a)(2), makes no such distinction and has been held to make awards in both types of action excludable from gross income.

> *Liepelt*, p. 496 and footnote 12;
> *Domeracki* v. *Humble Oil & Ref. Co.*, 443 F.2d 1245, 1249 (3rd Cir. 1971), *cert. den.* 404 U.S. 883;
> *Hooks* v. *Washington Sheraton Corp.*, 578 F.2d 313, 317 (D.C. Cir. 1977).

In both types of cases "past" loss of earnings means earnings lost from the date of injury to the date of trial, and "future" loss of earnings means loss of earnings from the date of trial into the future.

The trial courts have applied the net-income rule of *Liepelt* to both past and future earnings losses.

> *Rother* v. *Interstate and Oceanic Transport Co.*, 540 F. Supp. 477, 486 (E.D. Pa. 1982);
> *Brown* v. *Penrod Drilling Co.*, 534 F. Supp. 696, 699-700 (W.D. La. 1982);
> *Roselli* v. *Hellenic Lines, Ltd.*, 524 F. Supp. 2, 3-4 (S.D. N.Y. 1980);
> *Barger* v. *Petroleum Helicopters, Inc.*, 514 F. Supp. 1199, 1210 (E.D. Tex. 1981), rev'd on other grounds 692 F.2d 337;
> *Nesmith* v. *Texaco, Inc.*, 491 F. Supp. 561, 564-5 (W.D. La. 1980).

Petitioner cites no cases which have failed to apply the net-income rule to past loss of earnings, and presents no grounds for distinguishing past loss of earnings from future loss of earnings in applying the net-income rule. While petitioner apparently accepts applying the net-income rule to future loss of earnings, even though this may involve speculation and uncertainty, he rejects the application of the net-income rule to past loss of earnings, where the calculations are simpler and more certain and all the facts can be known by the time of trial.

What petitioner is really seeking here, without expressly saying so, is for this Court to reverse its recent decision in *Liepelt*. He advances many of the same arguments that were put before this Court in *Liepelt* in the original hearing and in the motion for rehearing.

Many of petitioner's arguments are simply incorrect. Railroad workers can receive sickness benefits under the Railroad Unemployment Insurance Act, 45 U.S.C. §§351-367, up to 130 days or more and many carry their own or union insurance in addition, so it is not true that the "majority of railroad workers are not paid during the time they are out of work because of injury (Petition, p. 9) and are "forced to seek welfare or other State aid" (Petition, p. 11). Railroad workers are among the best paid of any, and for those few in poor financial condition, advance payments are frequently made.

Injured railroad workers have the right (usually not exercised) to allocate any part or all of a settlement to "time lost" so as to receive credit for that time toward their ultimate pension, so it is not true that when "an injured employee does not work and is not paid, he receives no credit toward his social security or pension funds" (Petition, p. 12). Whether he receives such credit is solely up to him not up to his employer, and whether his employer has to pay any unemployment or retirement taxes depends not on the employer's volition but on the employee's decision to allocate part or all of his settlement or judgment to "time lost".

The existence of the net-income rule of damages has nothing to do with the employee's allocation or non-allocation to "time lost", and that allocation, if made, can apply to both past and future earnings if the employee so chooses.

In conclusion, petitioner presents no cases to support his position, suggests no conflict among lower courts, offers no novel or important issue to be decided, evidences no gross miscarriage of justice in the case at bar, and indicates no federal law or practice in need of clarification or rectification. His petition is based on a misreading of *Liepelt*, and should be denied.

Respectfully submitted,

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